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IN THE

Supreme Court of the United States

October Term, 1961.

No. 282.

ATLANTIC AND GULF STEVEDORES, INC.,
Petitioner,

v.

ELLERMAN LINES, LTD.
and
THE CITY LINE, LTD.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE PETITIONER.

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No.

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v.

ELLERMAN LINES, LTD., AND
THE CITY LINE, LTD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINION OF THE COURTS BELOW.

The District Court did not file an opinion. The opinion of the Court of Appeals for the Third Circuit is recorded in 289 F. 2d 201 (R. 217). The Court of Appeals for the Third Circuit did not file an opinion denying the petition for hearing of Atlantic and Gulf Stevedores, Inc.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 7, 1961 (R. 231). The Order denying the Petition for rehearing was entered on May 31, 1961 (R. 232). The petition for Writ of Certiorari of Atlantic & Gulf Stevedores, Inc., was granted on October 16, 1961 (R. 233). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED.

U. S. C. Constitution Amendment VII—Civil Trials.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

QUESTIONS PRESENTED.

No. 1. In a suit by a shipowner claiming indemnity from a stevedoring contractor is not the reversal of a judgment founded on a special verdict of the jury clearly supported by the evidence that a stevedoring contractor was not negligent or in breach of its contractual obligations, there being no rule of law making such finding by the jury improper, a re-examination of facts tried by a Jury otherwise than according to the rules of the Common Law and as such a violation of the Seventh Amendment of the Constitution of the United States?

No. 2. Where a shipowner and a stevedoring contractor enter into a written contract which expressly defines the obligation of each, and a Jury's special verdict, supported by the evidence acquits the stevedore of any failure to do its work in accordance with the contractual obligation is it not error for an Appellate Court to set aside the factual finding of the Jury and reverse a judgment entered upon such verdict on the ground that the stevedore, as a matter of law, breached its warranty to perform the obligations of the contract with reasonable safety?

No. 3. Where the verdict of a jury is based upon substantial and competent evidence, and the Trial Court's charge encompassed all of the issues raised by the pleadings, proofs and the contractual obligations of the parties, may the Court of Appeals reverse such verdict without a holding or showing that the special verdict of the jury is clearly erroneous?

STATEMENT OF THE CASE.

Leighton Beard, resident and citizen of Pennsylvania, brought this civil action, founded upon the diversity jurisdiction of the District Court against Ellerman Lines, Ltd. and The City Line, Ltd., British corporations, hereinafter referred to as "Ellerman", to recover damages for serious injuries sustained in the course of discharging bales of burlap from the latter's vessel, S. S. "City of Calcutta". The accident occurred July 1, 1955. Beard, a longshoreman, was employed by Atlantic & Gulf Stevedores, Inc., hereinafter referred to as "Atlantic", a concern engaged in stevedoring services for Ellerman.

Beard's complaint against Ellerman alleged that the latter's vessel was unseaworthy and that Ellerman was negligent. Ellerman impleaded Atlantic as a third-party defendant alleging that Beard's injuries resulted from Atlantic's failure to properly perform the work of unloading the cargo, using a negligent manner to unload the cargo, using devices that were dangerous, improper and in violation of its agreement with Ellerman (R. 11a). Ellerman sought indemnity from Atlantic, under their contract, in the event it was held liable to Beard.

The undisputed facts indicate that the bales of burlap had been loaded in India. The bales in question weighed approximately eleven hundred pounds, measuring two feet by three feet by four feet and were stowed in the lower 'tween deck of the number one hatch of the Ellerman vessel, the "S. S. City of Calcutta" (R. 2b). Atlantic played no part in the loading or stowage of this cargo.

There were sixty-three tons of New York bales in the forward end of the hold extending out halfway into the square of the hatch, adjoining one hundred tons of Philadelphia bales of burlap stowed to an equal height and extending to the after end of the hold (R. 109b). Though the vessel arrived from New York, no evidence was offered to explain why the New York bales had not been discharged.

The bales were tightly bound by four parallel one-inch bands, each bale containing thirty to forty bolts of burlap and were tightly stowed in layers on tiers.

The discharging operation consisted of pulling the bales from their tightly stowed position to the square of the hatch by winches and raising them vertically out of the vessel and on to the pier. This was accomplished by use of a ring to which six equal length ropes were attached. A large flat-end hook on the end of each rope was inserted under the metal bands which compressed the bales, using two hooks per bale (R. 2b). Three bales were thus raised together. Beard and his fellow longshoremen would then signal the winch operator to pull the bales from their stow to the hatch square, and after overcoming side-sway, the bales would be raised vertically. The holdmen would then seek shelter away from the square of the hatch protected by the coaming. After about three hours of such operation, two tiers of the Philadelphia bales had been removed. As a draft of three bales was being lifted out of the hatch to a height of approximately thirty feet, in a vertical lift, the two bands of one bale broke, causing the bale to fall. It struck the New York cargo and bounded in the direction of Beard, pinning him against the after bulkhead and causing injuries which necessitated the amputation of his right leg above the knee (18b, 25b, 30b). No other bales were known to have fallen while being lifted vertically prior to the accident in question or during the years of experience of any of the witnesses or experts who testified in the case.

The case was tried before the Honorable Chief Judge J. Cullen Ganey and a jury. After ten days of trial the issues were presented to the jury upon five interrogatories, phrased after much discussion in a form agreed upon by counsel (185b-215b). After deliberation, the jury returned with the following answers to interrogatories (187a-189a):

1. Was unseaworthiness a substantial factor in causing the injuries to the Plaintiff?
   Yes.

2. Was there negligence on the part of Ellerman Lines, Ltd., which was a substantial factor in causing injuries to the Plaintiff?
Yes.

3. In what amount, if any did you assess the damages to be awarded the Plaintiff?
$100,000.00.

4. If you have answered "yes" to interrogatories 1 and 2 did the fault of Ellerman Lines, Ltd., and the City Line, Ltd. arise out of any failure on the part of Atlantic and Gulf Stevedores, Inc., to do its work in accordance with the contractual obligation?
No.

5. If you have answered "yes" to interrogatory No. 4, was Atlantic and Gulf Stevedores, Inc.'s breach of this contract a substantial factor in bringing about the injuries to the Plaintiff?
No.

The District Court entered judgment on the special findings of the jury in favor of Beard against Ellerman and in favor of Atlantic upon Ellerman's claim for indemnity. Ellerman's motions for judgment n.o.v. or for a new trial, were denied on April 4, 1960 without opinion and Ellerman appealed to the Court of Appeals for the Third Circuit. On April 7, 1961 the Court of Appeals for the Third Circuit affirmed the judgment in favor of Beard and against Ellerman, but reversed the finding of the jury and the judgment in favor of Atlantic upon the reasoning that if the jury based its finding of negligence against Ellerman for improperly stowing the New York cargo adjoining the Philadelphia cargo thus creating an unsafe place to work, it was equally negligent for Atlantic to handle the cargo. The Court erroneously found that the District Court had limited the sole criterion of the jury's test as to whether Atlantic had breached its contract of work-

manlike service, to the use of the bale hook method alone and, without regard to whether the discharge operation was conducted in an unsafe place. The charge demonstrates that the District Court did not so limit the jury's test (R. 171a, 172a, 173a).

The Court of Appeals found as a matter of law that Atlantic was liable to Ellerman for indemnity for breach of its warranty to perform the obligations of the contract with reasonable safety. The issue of unseaworthiness was not considered by that Court.

Petitioner moved for rehearing upon the grounds that the weight of the evidence supported the jury's verdict,[1] that no evidence was presented to support the conclusion that Atlantic was negligent as a matter of law, that the action of the Court was in violation of the Seventh Amendment to the Constitution and that the Court erred in holding Atlantic liable as a matter of law notwithstanding that the jury found no breach of Atlantic's written contract. Petitioner further contended that the Court erred in con-

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1. The great weight of the evidence was to the effect that the method being used by the Petitioner was the established method of discharging bales of burlap (R. 43a, 7b, 23b, 39b, 43b-44b, 59b, 73b, 75b-76b, 83b-84b, 105b, 120b, 123b); the method prescribed by the safety rules for cargo operations (R. 49b); the only method used on the vessels of the shipowner in the port of Philadelphia (R. 19b, 23b, 68b, 70b, 167b); the same method used on double bales weighing 1700 pounds each (R. 114b, 120b-121b); the only practicable method (R. 83b, 123b).

None of the witnesses had ever seen bands break causing a bale to fall while the draft was hoisted out in a straight lift (R. 14b, 22b, 123b, 134b). The method was regarded by the experts as "usual and customary" and as a "safe method" (R. 123b); described as a "safe method of unloading this cargo" (R. 59b); "safest customary method" (R. 84b). The longshoremen had never seen bands break during the vertical lift except at the time of the accident in question (R. 14b, 38b). An expert who made scientific tests on bands identical with those in use at the time of the accident testified that the method of discharge used by Atlantic and Gulf is perfectly safe for unloading bales which weigh 1,000 to approximately 1,400 pounds" (R. 160b). His tests established a safety factor of 7.7 to 1 when two bands were used in lifting the bales (R. 160b-161b).

cluding that the District Court failed to submit to the jury the issue of "unsafe place to work" since the instructions to the jury encompassed all of the issues raised in the pleadings, during the trial and the terms of the contract which was offered in evidence.

The Court of Appeals denied the Petition for a rehearing without opinion.

SUMMARY OF ARGUMENT.

A. In the trial court, the jury found specifically that the petitioner had not breached its contractual obligation and that the fault of the shipowner did not arise out of any failure of petitioner to do its work in accordance with the contractual obligation. The Court of Appeals reversed this finding of the jury and held that the finding of negligence as to the defendant shipowner required a corollary finding that the petitioner was also negligent, and hence held petitioner liable to respondent, by way of indemnity, for the same negligence which made respondent liable to plaintiff. The finding of the jury that petitioner had not breached its contractual obligation and that the shipowner's liability did not arise out of any failure of petitioner to do its work in accordance with the contractual obligation was amply supported by the evidence. There was no rule of law making such a finding of the jury improper. The finding of the jury was resolved under appropriate instructions of the Court.

It is submitted that under the circumstances, the Court of Appeals violated the provisions of the Seventh Amendment of the Constitution of the United States providing that "no fact tried by a jury should be otherwise reexamined in any court of the United States, than according to the rules of common law." An appellate court may not *redetermine* a fact properly submitted, and found by a jury, which is supported by the evidence and substitute its own conclusion or finding of fact. Such a procedure denies to the party a trial by jury as guaranteed by the Seventh Amendment and violates the interdict of the last part of the Amendment.

Disregarding its obligation to accept the jury's findings sustained by the evidence, as such findings related to the question of breach of contract, the Court of Appeals equated the negligence of respondent as determined by its duty to plaintiff with the obligations owing by petitioner to re-

spondent under the written contract and held petitioner liable to respondent for the same negligence. This was clearly error, since petitioner was not liable to plaintiff for anything it did, so long as it met its obligation to plaintiff under the Longshoremen's Act (33 U. S. C. Sec. 901, et seq.). The question of petitioner's compliance with the contractual obligation was clearly a factual question for the jury and its finding could not be disturbed unless clearly erroneous.

Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable: *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 4 L. Ed. 2 142; *Hodgson v. Lloyd Brasileiro Patrimonio Nacional*, 294 F. 2d 32, 32.

The record demonstrates that the findings of the jury were not clearly erroneous and the Court of Appeals erred in reversing them in violation of the provisions of the Seventh Amendment.

B. The contract of the parties in the instant case contained no language expressly agreeing to indemnify respondent for damages paid by it, because of injuries to persons, under any circumstances. It merely provided that petitioner would do its work "with every care and due dispatch to the satisfaction of the respondent". It did its work under the watchful eye of respondent's chief mate who had authority to stop the stevedore's operations but chose not to do so (R. 220).

The trial judge told the jury that the whole contract should be adverted to and instructed the jury to determine whether *any* breach of the contract occurred (R. 171a). Imposing even a greater burden than the contract, it asked the jury to decide whether petitioner breached its contract to do its work "in a workmanlike manner *with the utmost care*" (R. 172a) and whether "there was a substandard performance in which there was foreseeability that injury

might occur to someone in the breach of that contract" (171a, 172a). The jury found in answer to an interrogatory that the fault of the shipowner for which it was found liable to the plaintiff did not arise out of any failure on the part of petitioner to do its work in accordance with the contractual obligation (R. 188a).

Under these facts and findings it is submitted that the Court of Appeals erred in deciding that the "testimony adduced afforded ample basis for a jury finding that the discharge of the Philadelphia cargo was carried on in an unsafe place to work and while that finding made Ellerman liable to Beard, *it also made Atlantic liable as a matter of law, to Ellerman for indemnity* for its breach of warranty as previously detailed" (R. 229) (Emphasis supplied).

We have already indicated that the Court could not reverse the jury's finding under the evidence, without violating the Seventh Amendment. We assert in the sections of our brief now being summarized that under the facts presented by the evidence and the findings of the jury (187a-189a), nothing short of a contract, agreeing to hold the shipowner harmless or indemnifying the shipowner against its own independent negligence and expressly accepting liability to petitioner's employees caused by the shipowner's acts in creating or causing an unseaworthy condition could be held to impose such absolute liability on the petitioner. Since no such contract existed, the effect of the decision below was to create such absolute liability on the part of the stevedore who enters into *any* agreement no matter how carefully the language of the agreement is drawn to limit an obligation of indemnity or foreclose it entirely.

Such holding is directly contrary to the holdings of this court in *Porello*, (330 U. S. 446, 91 L. Ed. 1011) and *Weyerhaeuser*, (335 U. S. 563, 2 L. Ed. 2, 491) since each of these cases require a reference to the contract to determine, as a matter of fact, the scope of the stevedore's undertaking relating to indemnity and *Weyerhaeuser* requires an additional factual inquiry into whether the shipowner was

itself guilty of conduct which would preclude recovery even where the obligation to indemnify is undertaken.

It is submitted that the best considered cases in the Circuits insist that these questions, consistently with the holding in *Porello* and *Weyerhaeuser*, must be determined by the jury. *McNamara*, 293 F. 2d 900, *Mathews*, 182 F. 2d 322, *Slattery*, 186 F. 2d 134, *Brown*, 211 F. 2d 16, *Hodgson*, 294 F. 2d 32, *Harrison*, 245 F. 2d 911, *Reddick*, 258 F. 2d 297.

We submit further that nothing said by this Court in *Ryan*, 350 U. S. 141, *Weyerhaeuser*, 355 U. S. 563, *Crumady*, 358 U. S. 423 or *Waterman*, 364 U. S. 421 changes this requirement or compels the determination that respondent is entitled to indemnity from petitioner as a matter of law under the particular facts of this case and the jury's findings.

We assert instead that neither the decision in the *Ryan* case nor any case involving similar issues since that decision was intended to undermine the limited liability set forth in the Longshoremen's Act or to announce as a principle of law that, without regard to the terms of the contract involved, a stevedore undertakes an absolute liability for such indemnity merely because it agrees to do the job. We submit *Weyerhaeuser* makes it clear that this is not intended by the cases decided by this Court and that on the contrary *Weyerhaeuser* makes it clear that in the *presence* of a written contract, the terms of the writing must be considered and will control.

We suggest that the holding of the Court of Appeals in the instant case thwarts entirely the import of the limited liability of a stevedore which the Longshoremen's Act was deliberately designed to afford except where the stevedore, by some contract, specifically and voluntarily assumes a consensual obligation to indemnify or burdens beyond those imposed by the Act.

We urge the application of principles of interpretation to our contract which are applicable to indemnity agree-

ments generally and cite authority that such contracts must express a clear intention by unequivocal language to impose a loss upon an indemnitor and that this rule is particularly true if one seeks to be indemnified against his own negligence, which has been found by a jury to be a substantial factor in causing the injuries of the original plaintiff.

The Court of Appeals in the instant case disregards the mandate of *Porello* and *Weyerhaeuser*, gives no consideration to and makes no reference to the contract between the parties and ignores the fact that it is bound by the jury's finding specifically exculpating petitioner of any breach of its contractual obligation or of any negligence in "handling" cargo in an unsafe place, after a full consideration of the facts and the contract under a full and proper charge of the Trial Court.

To hold that a stevedore may be liable as an indemnitor for the liability of a shipowner caused by the shipowner's negligence and conditions committed and existing at the time of the application of the contract and merely for working under such conditions or for the interaction of such conditions, equipment or stowage which the Petitioner did not control and had no contractual duty to supply, repair, correct or control, is to make of the stevedore an absolute guarantor and to create a contractual indemnity far beyond the compass of the agreement actually made and here involved.

The issues involved herein are of national importance to the stevedoring and shipping industry. The decision of the Court of Appeals is a major departure from the rulings made by this Court and if allowed to stand will create further disharmony in the uniform application of the doctrines enunciated by this Court.

This decision is a sharp erosion of the Constitutional mandate that "No fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law." Unless this decision is reversed, further erosion of the mandate will surely follow.

ARGUMENT.

I.

The Decision of the Court Below Reversing a Judgment Entered Upon the Unanimous Verdict of a Jury Violates the Provisions of the Seventh Amendment to the Constitution of the United States Which Provides That "No Fact Tried by a Jury, Shall Be Otherwise Re-Examined in Any Court of the United States, Than According to the Rules of the Common Law," There Being No Rule of Law Making Such a Finding by the Jury Improper.

The decision of the Court of Appeals in the instant case reversing the unanimous verdict of impartial jurors was a capricious and unreasonable action directly contrary to the provisions of the Seventh Amendment to the Constitution of the United States. The decision marks another step in the gradual erosion which has unfortunately worn away part of the essential guarantee of the Seventh Amendment.

The Seventh Amendment to the Constitution of the United States provides:

> "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, *and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*" (Emphasis added.)

The amendment has for its primary purpose the preservation of "common law distinction between the province of the Court and that of the jury, whereby, in the absence of express or implied consent, issues of law are resolved by the Court and issues of fact are resolved by the jury under

appropriate instructions of the Court": *Baltimore & C. Line v. Redman*, 295 U. S. 654, 657 (1935); *Walker v. New Mexico & S. P. R. Co.*, 165 U. S. 593, 596 (1897); *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U. S. 494, 497-499 (1931); *Dimick v. Scheidt*, 293 U. S. 474, 476, 485-86 (1935).

The aim of the amendment to preserve the historic line separating the province of the jury from that of the judge, still permitted procedural improvements which did not transgress this line. (See Constitution of United States, Revised and Annotated 1952 Senate Document No. 170 82nd Congress 2nd Session p. 895 for illustrations of this development.)

The only modes known to the common law to re-examine such facts as are properly tried by a jury are the granting of a new trial by the Court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings: *Parsons v. Bedford*, 3 Pet. 447, 7 L. Ed. 732.

Prior to the enactment of Rule of Civil Procedure 50, 28 U. S. C. A. federal courts did not have the right even where the evidence was insufficient as a matter of law to do anything more than grant a new trial. Rule 50(b) was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It merely renders unnecessary a request for reservation of the question of law or a formal reservation and in addition it regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct. "It adds nothing of substance to rights of litigants heretofore existing through a more cumbersome procedure: *Montgomery Ward v. Duncan*, 311 U. S. 230; *Berry v. United States*, 312 U. S. 450. In the latter case (312 U. S. p. 452) this Court said:

> "But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested

issues of fact a jury being the constitutional tribunal provided for trying facts in courts of law."

A trial court may not now and has never had the right pursuant to the Constitution of the United States to *predetermine* an essential fact. An appellate court may not now and has never had the right to *redetermine* a fact properly submitted and found by the jury which is sustainable by the testimony *and substitute its own conclusion or finding of fact.* Such a procedure clearly denies the party a trial by jury guaranteed by the Seventh Amendment and violates the interdict of the last part of the amendment which requires that no fact be re-examined once found by a jury except in accordance with the common law: *U. S. v. Alfred Mansueak*, 234 F. 2d 421; *Bollenbach v. U. S.*, 326 U. S. 607, 66 S. Ct. 402, 90 L. Ed. 350; *Liberty Mutual Insurance Company v. Thompson*, 171 F. 2d 723 (C. C. A. 5th 1948); *Curtis v. A. Garcia Y Cia*, 272 F. 2d 235, 238 (C. C. A. 3rd 1959).

In our case, the Court of Appeals was wholly indifferent to the established basis upon which powers have been allocated between the court or jury and was beguiled into rejection of a view of the facts which seemed to it less reasonable than its own view, a violation of Petitioner's constitutional rights, which cannot be condoned.

In submitting the issues to the jury the District Court Judge under clear and proper instructions (see this Brief p. 39) let the jury decide whether or not there was an unreasonable discharge of this cargo, an unsafe method used in the discharge thereof and asked it to relate its findings to the special interrogatory No. 4 which asked it to state whether the fault of Ellerman arose out of any failure on the part of the Petitioner to do its work in accordance with the contractual obligations between it and the shipowner. The jury answered this latter interrogatory (R. 187a, 189a) in the negative having first stated in response to interrogatories Nos. 1 and 2 respectively that unseaworthiness was a

substantial factor in causing the injuries to the plaintiff and that negligence on the part of Ellerman was a substantial factor in causing injuries to the plaintiff (R. 188a). Despite these clear factual findings the Court of Appeals found (R. 227): "Thus if it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic to 'handle' the cargo in the unsafe place to work." The jury had made a completely contrary factual finding and even if its finding in the Court's view was erroneous under the facts, there being sufficient evidence to sustain its finding, the Court could not *substitute* its own finding in order to reverse.

It is submitted that to justify a reversal and a direction to find against Petitioner there would first have to be an insufficiency of testimony to support the specific finding of the jury or a basic error of law as to how its finding once made should be applied.

The Court of Appeals had itself noted the distinction between the jury's answer to interrogatory No. 2 (in which it held Ellerman negligent) and its answer to interrogatory No. 4 (in which Petitioner was absolved from liability over to Ellerman) by saying (R. 225):

> "In answering Interrogatory No. 2 the jury was determining *the issue of negligence* between Beard and Ellerman. In answering Interrogatory No. 4, the jury was determining, necessarily, the *contractual obligation* of Atlantic to Ellerman."

The fact is however that while Ellerman was liable to Beard for negligence, the Petitioner was not liable to Beard for anything it did, so long as it met its absolute obligations to Beard under the Longshoremen's and Harbor Workers' Act (33 U. S. C. Sec. 901 et seq.).

Petitioner's contractual liability to Ellerman for indemnity involved a consideration of the terms of the contract: *Weyerhaeuser SS Co. v. Nacirema Co.*, 355 U. S.

563. The contract and its terms however were neither referred to, reviewed nor construed by the Court of Appeals.

Disregarding completely its obligation to accept the jury's findings where sustainable by the evidence, as such findings related to the question of breach of the contract, the Court of Appeals merely equated the negligence of Ellerman as determined by its duty to Beard with the obligations owing by Petitioner to Ellerman solely by reason of the written contract, and held Petitioner liable to Ellerman for the *same* negligence which made Ellerman liable to Beard, the plaintiff.

The Court of Appeals points out that "the record affords ample basis for a jury fact finding that (1) use of the bale hook method in the discharge of burlap bales constituted negligence and (2) that the injured longshoreman was not afforded a safe place to work" (R. 227).

But despite the fact that the record afforded a basis for such findings, *these findings were not made as to the Petitioner*, although the charge of the court left to the jury "whether there was a sub-standard performance in which there was foreseeability that injury might occur to someone in the breach of that contract . . ."

The District Court specifically posed to the jury the questions (R. 172a):

> "Did the Atlantic & Gulf Stevedores create the condition which made Ellerman Lines and the City Line responsible to the plaintiff? . . . Did they breach that contract to do it in a workmanlike manner with the *utmost* care? . . . In other words did the liability of the Ellerman Lines Limited and the City Line Limited arise out of *any* failure on the part of Atlantic & Gulf Stevedores to do its work in accordance with the contractual obligations?" (Emphasis supplied.)

The jury said "*no*" to all of these questions by its answer to interrogatory No. 4.

As was well stated by Mr. Justice Lamar in *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 417:

> "The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court."

The courts are constantly urged in cases of this character to substitute their judgment for that of the jury on questions of fact. The seductive argument is made that a conclusion of fact which appears by the court to be reasonable is so clear that reasonable men could reach no other. If this sort of reasoning is allowed to prevail, however, it means that the courts are substituting their judgment for that of the jury on fact questions in violation of constitutional requirements: *Burcham v. J. P. Stevens Co.*, 209 F. 2d 35.

The question in the instant case, whether the Petitioner had complied with its contractual obligation that "*All the work shall be done with every care and due dispatch to the satisfaction of the party of the first part.* (shipowner)" (R. 148a) was clearly a factual question for the jury.

Most recently in *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 4 L. Ed. (2) 142, 80 S. Ct. 173, Mr. Justice Brennan delivering the opinion of the Court in a case involving a factual determination by a jury under the Jones Act, stated that:

> "*The members of the jury, not the medical witnesses were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony into consideration.* . . . The focal point of judicial review is the reasonableness of the particular reference or conclusion drawn by the jury . . . The very essence of its (the jury's) function is to select from among conflicting references and conclusions that which it considers most reasonable . . . *Courts are*

> ***not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*** Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 35, 88 L. Ed. 520, 525, 64 S. Ct. 409, 15 NCCA U. S. 647. See Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 1 L. Ed. (2) 493, 77 S. Ct. 443." (Emphasis supplied.)

In the instant case, the finding of negligence by the jury as to the defendant shipowner did not require *as a matter of law* a corollary finding that the stevedore was also negligent. The facts in evidence[2] justify a contrary finding and the Court of Appeals could not reverse it by suggesting that it was required as a matter of law.

In *Lavender v. Kurn*, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740, this Court said:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where as here there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable:"

See also *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67; *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 353; *Blair v. Baltimore & Ohio R. R. Co.*, 323 U. S. 600, 89 L. Ed. 490.

Indeed in two cases dealing essentially with the issues involved in this case, the Court of Appeals for the Third Circuit has met the issue in conformity with the requirements of the Seventh Amendment. Most recently in *Hodg-*

2. See footnote 1 (P. 6 of this brief).

son v. Lloyd Brasileiro Patrimonio Nacional, 294 F. 2d 32, the jury in answer to a special interrogatory, found that the shipowner was not guilty of negligence but based upon a finding of unseaworthiness, made an award in favor of Hodgson against it. The shipowner argued on appeal that judgment rendered against it in the third party proceedings for indemnity must be reversed as a matter of law despite a jury finding that the stevedoring company had performed its services in a "workmanlike, safe and proper manner". The Court of Appeals said:

> "The shipowner forgets that an appellate court will not interfere with a judgment entered on a verdict returned by a jury simply because of its opinion as to the weight or preponderance of the evidence. Liberty Mutual Insurance Co. v. Thompson, 171 F. (2d) 723 (C. A. 5 1948); Harnick v. Lilley, 167 F. (2d) 159 (C. A. 8 1948); 5 Moore's Federal Practice Sec. 38.08 (5 p. 89)."

In the latter decision the Court referred to its own decision in *Hagans v. Farrell Lines, Inc.,* 237 F. 2d 477 (1956) where, in an opinion written by Judge Kalodner, the court felt bound by the jury's finding and specifically referred to *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.,* 355 U. S. 563, saying:

> "Whether the stevedoring company's conduct constituted a breach of the provision (of the agreement) was, of course, a question of fact for the jury."

The specific holdings in *Hagans* and *Hodgson,* referred to above, make the action of the Court of Appeals in this case the more startling. The jury was thus justified in finding that the fault of the shipowner did not "arise out of any failure on the part of Atlantic and Gulf Stevedores, Inc., to do its work in accordance with the contractual obligation" (188a).

The Appellate Court must resolve all conflicts in the evidence in favor of the party against whom the judgment is sought and reject any evidence to the contrary. *Downing v. Union Paving Co.*, 184 F. 2d 481 (C. C. A. 3rd 1949); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944); rehearing denied, 321 U. S. 802; *Sentilles v. Inter-Caribbean Shipping Corp.*, 80 S. Ct. 173, 361 U. S. 107 (1959).

The application of the standard of appellate review expressed by this Honorable Court in *McAllister v. United States*, 348 U. S. 19, 99 L. Ed. 20, 75 S. Ct. 6 was disregarded by the Court of Appeals. In the *McAllister* case the court said (U. S. pp. 20-21, L. Ed. p. 24):

> "In relation to the District Court's findings we stand in review in the same position as the Court of Appeals. The question therefore, is whether the findings of the District Court are *clearly erroneous.*" (Emphasis supplied.)

Applying this standard to the present case the Court of Appeals could reverse the judgment in favor of Atlantic only if the jury's findings were clearly erroneous. The record demonstrates that the findings of the jury were *not* "clearly erroneous" and the Court of Appeals erred in reversing them in violation of the provisions of the Seventh Amendment. Upon this ground alone, the decision of the court below should be reversed, and the Judgment in the District Court reinstated.

II.

The Decision of the Court Below Is in Conflict With the Rule Laid Down in the Decisions of the Supreme Court in American Stevedores, Inc. v. Porello, 330 U. S. 446, 91 L. Ed. 1011, 67 S. Ct. 847, and Weyerhaeuser Steamship Co. v. Nacirema, 355 U. S. 563, 2 L. Ed. 491, 78 S. Ct. 438 (1958) Which Hold That in the Presence of a Written Contract All Fact Issues Involved in the Third Party Action, Including the Intention of the Parties to Such Writing, the Extent, Scope and Application of the Contractual Obligations Between the Shipowner and Stevedore, and Whether They Were Breached Are Issues to Be Decided by the Jury.

The decision of the Court below in the instant case is directly in conflict with the decisions of this Court in *American Stevedores, Inc. v. Porello*, 330 U. S. 446, 91 L. Ed. 1011, 67 S. Ct. 847 and *Weyerhaeuser Steamship Co. v. Nacirema*, 355 U. S. 563, 2 L. Ed. 2d 491, 78 S. Ct. 438 (1958).

There has been a considerable disagreement among other Courts about this Court's holdings in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 90 L. Ed. 1099, 66 S. Ct. 872; *Halcyon Lines v. Haenn Shipcoiling & Refitting Corp.*, 342 U. S. 282, 96 L. Ed. 318, 72 S. Ct. 277; *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, 98 L. Ed. 143, 74 S. Ct. 202; *Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp.*, 350 U. S. 141; *Weyerhaeuser Steamship Co. v. Nacirema Steamship Co.*, 355 U. S. 563 (1958); and *Crumady v. Joachim Hendrik Fisser*, 358 U. S. 423.

The active area of litigation involving suits for indemnity and so-called "contribution" by vessel owners against independent stevedoring contractors set the stage for this group of decisions by this Court extending the warranty of seaworthiness to a class of workers which had consistently been regarded as strangers to the rigors inherent in the work of those who went down to the sea in

ships. Thus, in 1946, in *Seas Shipping Company v. Sieracki*, (*supra*) the Supreme Court of the United States initiated this unprecedented course by holding that longshoremen were entitled to the warranty of seaworthiness. In *Halcyon Lines v. Haenn Shipceiling & Refitting Corp.*, (*supra*) (1952) this Court determined that the vessel could not seek contribution from an independent stevedoring contractor as an avenue to insulate its new and judicially acquired exposure. In *Pope & Talbot, Inc. v. Hawn*, (*supra*) (1953) this Court further extended the warranty of seaworthiness to cover a carpenter who was temporarily working aboard ship.

In 1956, this Court developed relief for the vessel by way of indemnity in the landmark decision of *Ryan Stevedoring Company v. Pan Atlantic Steamship Corp.*, (*supra*) wherein this Court held that the provisions of Section 5 of the Longshoremen's and Harborworkers' Compensation Act, 33 U. S. C. 905, did not act as a bar to the shipowner's asserted right to recover indemnity. The rationale behind the Court's holding on this point can best be summarized in these words from the opinion:

> "While the compensation act protects a stevedoring contractor from actions brought against it by its employee on account of the contractor's tortious conduct causing injury to the employee the contractor had no logical ground for relief from the full consequences of its *independent contractual obligation, voluntarily assumed to the shipowner to load the cargo properly*. . . ."
>
> ". . . The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employees. *The Third-Party Complaint is grounded upon the contractor's breach of its purely consensual obligation owing to the shipowner to stow the cargo in a reasonably safe manner.* Accordingly, the shipowner's action for indemnity on that

basis is not barred by the compensation act". (Emphasis supplied.) (350 U. S. 131, 100 L. Ed. 140, 76 S. Ct. 239.)

The Court clearly indicated that the decision would be based on contractual principles and expressly refused to meet the question on common law indemnity principles:

"Because respondent in the instant case relies entirely upon Petitioners contractual obligation, we do not meet the question of a non-contractual right of indemnity or of the relation of the Compensation Act to such a right."

The Court reasoned that Ryan having agreed to perform *all* of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded, of necessity agreed to stow the cargo properly and safely and that failure to do so was in effect a violation of the very essence of the stevedoring contract. The Court stated that the stevedore owed to the shipowners a *"warranty of workmanlike service"* which the Court compared to a manufacturer's warranty of soundness of its manufactured product. The Court rejected the theory that the shipowner's duty to supervise the stowage and right to reject unsafe stowage, would preclude it from recovering indemnity. There is nothing in the opinion of any Court considering the *Ryan* case to indicate that it was ever urged or proved that the vessel had *actual knowledge* of the condition resulting in injury to the longshoreman. Instead the Courts considering the *Ryan* case viewed the fault of the vessel as arising from the fact that the vessel *failed* to *discover and should have known of the improper stowage. Clearly in Ryan the vessel owner had no actual knowledge of the defects and its failure was merely one to inspect and discover the defect.*

In the *Ryan* case there was a direct service agreement and a finding that the injuries were sustained as a result

of the stevedore's breach of warranty to perform the obligations of the contract with reasonable safety. Thus the Court did not reach the issue of the exclusionary effect of the Compensation Act under a right of action of a shipowner under comparable conditions without reliance upon an indemnity or service agreement of a stevedoring contractor. In that case the Third-Party Complaint was grounded upon the contractor's breach of its purely consensual obligation owing to the shipowner to stow the cargo in a reasonably safe manner, the contractor having assumed the entire duty of the shipowner. It was accordingly held that the shipowner's action for indemnity was on that basis not barred by the Compensation Act.

Where however no such consensual obligation was expressly assumed by the contractual arrangement, and the entire duty of the shipowner had not been assumed, and the shipowner had actual knowledge of the conditions, as in the case at bar, or if a contract cannot be read to lay the groundwork for such a consensual assumption, there can be no action of indemnity: *Brown v. American Hawaiian S. S. Co.*, 211 F. 2d 16 (3rd Cir. 1954). The Court of Appeals there repeated what it thought it had made clear in the case of *Crawford v. Pope & Talbot, Inc.* (206 F. 2d 758):

> "There can be no action of indemnity in these cases which is not based on the violation of some contractual duty. Were the rule otherwise the employer could be made to respond indirectly in tort for damages for which he would not be answerable under the Longshoremen's and Harbor Workers' Act. Such a rule would be violative of Section 5 of the Act as well as the spirit of the entire statute whereunder an employer's duty to pay compensation to his injured employees without regard to negligence is substituted for his common law tort liability. *Pope & Talbot v. Hawaii*, 346 U. S. 406, 412, 74 S. Ct. 202."

The contractual nature of the shipowner's claim has been properly pointed up in both *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 784 and in *Read v. United States*, 201 F. 2d 758 in the Third Circuit and in *American Mut. Liability Ins. Co. v. Matthews*, 182 F. 2d 322 and in *Slattery v. Marra Bros.*, 186 F. 2d 134 in the Second Circuit.

In *Matthews* the claim was for contribution but in denying it the Court relied upon indemnity cases and rested the result squarely on the effect of the contractual relationship between the parties. The Court there said:

> "In the case at bar no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the very purpose to which it was put. Nor can a promise be implied that he will use care to detect any defect in the equipment which patently existed when the equipment was delivered for use by the employer. *To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an express promise, such an implication would be utterly unreasonable. Hence we can find no contractual basis for indemnity or contribution.* To impose a non-contractual duty of contribution on the employer is *pro tanto* to deprive him of the immunity which the statute grants him in exchange for his absolute, though limited liability to secure compensation to his employees". (Emphasis in part supplied.)

In *Slattery v. Marra*, (*supra*) the Court repeated that the shipowner in seeking indemnity could rely only upon a breach of contract.

After *Matthews* and *Slattery*, the Third Circuit adopted the same view in the *Crawford* and *Read* cases and dispelled any doubt as to its position in the case of *Brown v. American Hawaiian S. S. Co.* referred to above.

Thus, in the Second and Third Circuit, the cases noted, notwithstanding the difference in emphasis made the existence of a contractual or other relational duty *running from the employer to the shipowner and a breach thereof* an indispensable condition to indemnity.

In the case at bar the jury found specifically and on ample evidence that the Petitioner had done its work in accordance with the contractual obligation and that no such breach was a substantial factor in bringing about the injuries to the Plaintiff (R. 188a). They had been asked to specifically decide whether there was any breach to perform the contract in a workmanlike manner with the *utmost* care and whether the liability of the shipowner arose out of *any* failure on the part of Petitioner to do its work in accordance with the contractual obligations (R. 172a). The Jury clearly and specifically decided that there was no breach and that the work undertaken had been performed in a workmanlike manner with the care required.

This Court again considered the indemnity question in *Weyerhaeuser Steamship Company v. Nacirema Operating Company, Inc.*, (*supra*). In that case, a winch shelter built in New York by the stevedore was permitted to remain while the ship proceeded to and arrived at Boston. There, the shelter was not inspected by either the stevedore or the ship's crew until the injury which occurred some five days after the arrival of the vessel in Boston. The case was tried to a jury with the judge *reserving submission* of the third-party action until he received the verdict on the main suit. The jury was charged as to both seaworthiness and negligence and returned a verdict in favor of the Plaintiff on the negligence cause of action *and in favor of* the vessel on the unseaworthiness count (236 F. 2d 349). After receiving the verdict for the Plaintiff in the main case, *the trial court directed a verdict in favor of the stevedoring contract against the vessel on the indemnity action.* The Court of Appeals affirmed the directed verdict. The Supreme Court of the United States in a unanimous opinion

reversed the Second Circuit and remanded the case for a new trial, holding that it was error for the trial court to direct a verdict in favor of the stevedore *and that the issues relating to indemnity should have been submitted to the jury.* The Court goes on to enunciate a principle, without clarification, that may well be the critical factor in indemnity actions (355 U. S. 567, 2 L. Ed. 2d 494, 78 S. Ct. 442):

> "If in this regard respondent rendered a substandard performance which lead to foreseeable liability of petitioner (the vessel) the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*" (Emphasis added.)

The Court gave no indication of just what conduct on the part of the vessel would be necessary to preclude recovery of indemnity against the stevedore, but indicated clearly that the test of liability in the indemnity action rests on *different* principles than the liability of the vessel to the Plaintiff in the main case. It reiterated in a footnote (2 L. Ed. 2d 282) the admonition of the *Ryan* case that (350 U. S. at 134): "the shipowner's action is not changed from one for a breach of contract to one for tort simply because recovery may turn upon the standard of performance of petitioner's stevedoring service", and stated (355 U. S. 567-568, 2 L. Ed. 2d 494-495, 78 S. Ct. 442, 443):

> "The evidence bearing on these issues (the indemnity issues)—Petitioner's action in making the shelter on its ship available to respondent's employees in Boston, although it apparently was unsafe, as well as respondent's continued use of the shelter for five days thereafter without inspection—*was for jury consideration under appropriate instructions.* These issues were not encompassed by the instructions in the main case, where the test of Petitioner's liability was based on failure to perform a non-delegable duty to Connolley.

Since the liability of respondent depended on different principles, Crawford v. Pope & Talbot, Inc., (C. A. 3 Pa.) 206 F. 2d 784, 792, all fact issues involved in the third-party action should have been submitted to the jury after the verdict in the main case." (Emphasis supplied.)

Recognizing that the jury verdict in the main case might have been predicated on one of at least three different grounds the Court concluded that at least one of these reasons, i.e., the failure on the part of the vessel during the five days in Boston to inspect the shelter and to detect and correct the unsafe condition would not preclude a recovery of indemnity by the vessel.

In *Weyerhaeuser* there was a *direct contract.* It did not contain an express indemnity clause but it obligated the stevedore to faithfully *furnish such stevedoring services as may be required,* and to provide *all necessary labor and supervision* for the proper and efficient conduct of the work. This Court held that such language constituted *a contractual undertaking* to perform with reasonable safety and *to discharge foreseeable damages resulting to the shipowner from the contractor's improper performance.* It then held that respondent's contractual obligation to perform its duties with reasonable safety related not only to the handling of cargo as in *Ryan,* but also to the use of equipment incidental thereto, such as the winch shelter there involved. This Court then said: *"if in that regard respondent rendered a substandard performance which led to foreseeable liability of Petitoner, the latter was entitled to indemnity."* (Emphasis supplied.)

This latter issue the Court said was for jury consideration under appropriate instructions and it found the trial court had erred in directing a verdict instead of submitting the issues involved in the third party case to the jury.

On February 24, 1959, this Court decided *Crumady v. Fisser,* (*supra*). The accident occurred there while cargo was being removed from cargo hatches by means of the

ship's cargo gear. While raising a draft of cargo a topping-lift parted, permitting a cargo boom and its attachments to fall into the hatch, striking and injurying the Plaintiff. The safe working load of the boom and topping-lift at the time of the accident was three tons. A shut-off device on the boom had been set at six tons by employees of the ship before being turned over to the longshoreman. The trial court held the vessel unseaworthy and liable to the injured longshoreman. The trial court found that the stevedores had shifted the boom in an effort to gain more clearance between the cargo and sides of the hatch, creating a load in excess of the safe working load. It held the stevedoring contractor liable for indemnity (142 F. Supp. 389) because it was negligent in bringing into play the unseaworthy condition of the vessel and that such negligence amounting to a failure of the stevedoring contractor to perform the duties necessarily comprehended within the contract was the sole cause of the injury.

The Court of Appeals for the Third Circuit reversed on the basis that the vessel was not unseaworthy and hence did not consider the question of indemnity. This Court reversed the Third Circuit, and held that the shipowner was not relieved of his duty to supply a seaworthy vessel by turning control of the loading or unloading of the ship over to the stevedoring company. The Court based its opinion on the fact that the shut-off-device was adjusted by the ship's crew so as to make it unsafe and dangerous for the work at hand. This Court, however, felt that the shipowner was entitled to indemnity under the principle announced in the *Ryan* and *Weyerhaeuser* cases, because the stevedore had assumed the responsibility by contract for the shipowners' damages resulting from improper performance of the services undertaken amounting to a breach of its contract, notwithstanding that the vessel's owners were not directly parties to the contract but merely beneficiaries of the contract. The Court concluded the District Court's finding that *the negligence of the stevedoring contractor*

brought the unseaworthiness of the vessel into play and amounted to a breach of warranty of workmanlike service, was not clearly erroneous. No such finding of negligence of the stevedore was made by the jury in our case.

The *Crumady* case still did not undertake a definitive statement of the "conduct on the part of the shipowner" which will bar indemnity. It merely indicated that furnishing defective equipment will not necessarily have that effect.

Thus, Courts attempting to apply *Weyerhaeuser* and *Crumady* have real difficulty in determining what conduct of the shipowner will bar indemnity *and are relegated to making comparisons to the actions of the owners in Crumady and Weyerhaeuser resulting in abstract and conjectural conclusions:* See *Calmar Steamship Co. v. Nacirema Operating Co.*, (4th Cir.) (1959), 266 F. 2d 79, 80, 81; *American Export Lines v. Revel*, (4th Cir.) (1959) 266 F. 2d 82.

In the latter case the Court said: "We do not attempt to explore what conduct, in other circumstances, would be 'sufficient to preclude recovery'. We merely hold that under the decisions of the Supreme Court the limits are not transcended here."

What are the limits? What is the conduct which will bar recovery by way of indemnity? Will any conduct of shipowner bar recovery in the case of the existence of a contract of indemnity? These questions remain unanswered by this Court, because their determination are matters of fact in each case, which *Weyerhaeuser* and *Porello* clearly hold should be submitted to a jury, and are not a matter of law as the Court of Appeals erroneously held in the instant case. Of the recent cases perhaps the case of *McNamara v. Weichsel Dampschifffahrts Ag Kiel, German*, decided by the Court of Appeals of the Second Circuit on September 27, 1961, 293 F. 2d 900, best applies the rule of the *Weyerhaeuser* case. In that case the Second Circuit recognized that it was a factual issue as to whether the shipowner was guilty of such conduct that would preclude its recovery for indemnity. The Court said at page 903:

"Pittston, having undertaken the stevedoring, was under a duty to perform it in a workmanlike manner. If it rendered substandard or improper service, Pittston would be under a duty to indemnify Weichsel for any liability imposed upon Wiechsel as a result of such service. This obligation to indemnify may be nullified, however, if Weichsel's conduct was such as to preclude recovery. The difficulty lies in determining what conduct is sufficient to defeat Weichsel's right to indemnity. The fact that the jury found Weichsel to have been negligent in the action between plaintiff and Weichsel is not conclusive of such conduct. Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 1958, 355 U. S. 563, 78 S. Ct. 438, 2 L. Ed. 2d 491; Ryan Stevedoring Co. Inc., v. Pan Atlantic Steamship Corp., 1956 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133. . . . However, whether Weichsel has been guilty of such conduct on its part as to foreclose indemnity is essentially a question of fact and should be determined by a jury. In Weyerhaeuser, the Supreme Court said 'all fact issues involved in the third party action should have been submitted to the jury after verdict in the main case. . . .'"

"Here there are at least two important fact questions. Was there substandard performance of its stevedoring contract by Pittston? Was there conduct by Weichsel sufficient to bar recovery? . . ."

In the instant case, since the jury specifically found for petitioner on the first of these two questions it was not necessary for it to consider the second question. But if it be assumed for the purpose of argument, that the Court of Appeals was right in holding that the jury should have found petitioner guilty of negligence, this fact is, as we have shown, not sufficient of itself to saddle liability for indemnity on petitioner. The jury would still be obliged to determine as a factual matter whether conduct of the shipowner

precluded such recovery under the rule of the *Weyerhaeuser* case. The latter fact was determined by the jury in its answer to Interrogatory No. 2 (R. 188a) when it found that the negligence of the respondent was a substantial factor in causing injuries to the plaintiff.

It is only where a jury or the fact finder, finds negligence of the stevedore amounting to a breach of contract and that there is an absence of conduct to preclude recovery of indemnity that an obligation to indemnify may be found.

In *Waterman S. S. Corp. v. Dugan & McNamara*, 5 L. Ed. 2d 169 (1960) the stevedore alleged as an affirmative defense that there had been no direct contractual relationship between it and the petitioner covering the stevedoring services. This Court held that although *Ryan* and *Weyerhaeuser* placed considerable emphasis on the direct contractual relationship between the shipowner and the stevedore, *Crumady* made it clear that the stevedore's assumption of responsibility for the shipowner's damages resulting from unsafe and improper *performance* of the stevedoring services, was unaffected by the fact that contractual *privity* was lacking, because the Shipowner was regarded as the third party beneficiary of the contract which was involved.

Certiorari was granted in the *Waterman* case "to consider whether in a situation such as this the *absence* of a contractual relationship between the parties is fatal to the indemnity claim" (5 L. Ed. 2d 171).

The rule of law requiring that the obligation to indemnify must arise out of some contract and in this class of cases must be based on the breach of some contractual duty has not been changed or abrogated by any of this Court's recent decisions.

It is thus clear that an action for indemnity *must arise out of a contractual obligation clearly expressed*, even though the parties are not in direct privity, and that an indemnitee has a claim which is independent of and does not derive from the injury to the employee.

It would thus seem that an obligation to indemnify cannot, since the enactment of the Longshoremen's Act, be

predicated on the quasi-contract theory of indemnity. That theory depended on the application of equitable principles, the need for which originated in the desire to escape the hardship of the common law prohibition against contribution, whereas the issue now becomes one of the duty between the putative indemnitor and indemnitee based on the relationship between them other than joint tortfeasor.

This Court, in this case, should consider whether in the *presence* of a written contract between shipowner and stevedore containing limited provisions for indemnity and expressly limiting the performance of the stevedore to fixed written standards and obligations which a jury expressly found were performed, a Court may nevertheless impose the burden of indemnity solely on an implied warranty of workmanlike service referred to in *Ryan, despite a well-founded specific finding of fact that no act of the stevedore was in breach of the written contract between the parties.*

In the presence of a writing defining the obligations of the parties, specific provisions setting forth the limits of the duties assumed by the Petitioner are to be expected. There is no evidence that in the instant case the parties had not chosen the language of the contract with care and premeditation. When it was desired that the shipowner be *indemnified* as to loss of cargo (R. 152a) it was not difficult to impose an obligation to reimburse and set forth the conditions under which the obligation so undertaken should be operative. We should expect no less as to the heavy burden of being responsible for injuries to longshoremen employed by the stevedoring company. Indeed, in view of the language of Section 5, of the Longshoremen's Act,[3] "a consensual obligation" such as found in *Ryan* and other cases to save the shipowner harmless, should be

3. "The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury. . . ." 44 Stat. 1426, 33 U. S. C. 905.

very clearly expressed within the requirement of the rules hereinafter discussed, applicable to indemnity agreements generally.

The decision of this Court in this case will have a salutary effect upon future transactions of shipowner and stevedore, if it concentrates the attention of litigants on the hazards of incomplete draftsmanship of contractual provisions defining the duties assumed by the stevedore. Thus for example, if it is intended that the employer shall assume the duty of *making* and keeping the vessel seaworthy, at least with regard to the parts and equipment to be used by his employees, and that this obligation shall extend no less to the appliances furnished by the shipowner than to those brought on board by the employer, *the contract should say so* and if they have not, it should at least be arguable that they intended the contrary by their omission. It is reasonable to require that such contracts be drawn so as to make clear those areas of responsibility which are to be unaffected by the contract relationship, as well as those which are assumed by the employer.[4]

The cases make it clear that if the shipowner has been found responsible to the longshoreman, because of negligence or failure to furnish a safe place to work or for breach of warranty, any claim for indemnity *which is not based on a duty assumed by a contract* between shipowner and employer or a contract of which the shipowner is a Third Party beneficiary (as in *Crumady* and *Waterman* above referred to) must give way before the effect of Section 5 of the Act.

Judge Learned Hand, in his concurring opinion, developed in some detail his views concerning the effect of the Act. Although he agreed that it "need not inevitably" be construed to bar the claim, he thought it should be so interpreted because:

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4. Weinstock, The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers, 103 U. of Pa. Law Review, 321, 346 (1954).

"it has imposed upon employers an absolute, though limited, liability, in exchange for a release from the preceding unlimited liability, conditional upon negligence. The release should, I submit, have the same scope as the imposed liability, which extends as well to injuries caused by a joint wrong, as to those caused by the wrong of the employer alone". (182 F. 2d 322, 325).

See *Union Stockyards Co. v. Chicago etc. R. Co.*, 196 U. S. 217, 49 L. Ed. 453;
Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U. S. 282;
Pope & Talbot Inc. v. Hawn, 346 U. S. 406.

The concept of "fault" or "negligence" of the stevedoring contractor in this class of case, as to the employee's injury is not now pertinent. As this Court said in *Ryan*, *"The shipowner's action here is not founded upon a tort or upon any duty which the stevedoring owes to its employee."* (Emphasis supplied.) On the other hand, the liability of the shipowner to the employee may be founded on negligence or failure to furnish a safe place to work or without fault for breach of warranty of seaworthiness.[5]

Of all the cases heretofore referred to however only *Weyerhaeuser*, (*supra*) and *American Stevedores v. Porello*, (*supra*) in the Supreme Court dealt with the *manner in which a specific written contract* relating to the indemnity obligation should be considered by the Court. In each of these cases the specific factual issue here involved was not encountered. But it is significant that in each case the

5. Weinstock, The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers, (*supra*, 323).

The basis for a claim of indemnity must be founded on a contract in effect between employer and shipowner and the breach of obligations arising thereunder. The jury in the instant case found no such breach.

Court held that the extent of the indemnity obligation assumed by the contract, when raised, and whether it applied to the specific facts leading to injury, when raised, were issues of fact and that all fact issues should have been submitted to the jury (2 L. Ed. 2d 494).

The *Porello* case was more analytical than the *Weyerhaeuser* case. Faced with a specific written contractual provision relating to indemnity, which at first reading appears to be clear, it nevertheless held that the clause was ambiguous and required evidence to be taken as to the intention of the parties so that the issue could be resolved *as a question of fact.*

Contrary to the requirement of these two cases that the terms of the contract be adverted to and the intention ascertained, the Court of Appeals in the instant case wholly disregarded the terms of the contract and the fact that there was a writing in which the parties had solemnly fixed their rights. It relied instead on the implied contract theory of *Ryan, Crumady* and *Waterman* where there were specific factual findings of negligence amounting to a breach of the warranty of workmanlike service. The Court of Appeals in the instant case also relied upon *American President Lines v. Marine Terminal Corp.*, 234 F. 2d 753, but in that case the specific terms of the contract were adverted to and considered and they were found as a fact to have been breached by the jury.

In the *Porello* case this Court held that the interpretation of the indemnity provision [6] of the contract was to be left in the first instance to trier of the facts having the benefit of whatever evidence existed as to the intention of the parties. There being no evidence as to the intention

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6. "The stevedore performing any service under this schedule shall be responsible for any and all damages or injury to persons and cargo while loading or otherwise handling or stowing the same, to any ship including its apparel and equipment, cars, and car-floats used in connection therewith, through the negligence or fault of the stevedore, his employees and servants."

of the parties in the record, the Court reversed the award of indemnity and remanded the case to the District Court for a determination of the meaning of the contract. This action stressed the care with which the intention of the parties as expressed in their contract must be analyzed. In the *Weyerhaeuser* case, *supra*, the action of the trial Court in *directing* a verdict in favor of the stevedore contractor was held to be improper. The evidence as to whether the stevedore rendered a substandard performance of its contractual obligation was held to be for the jury's consideration under appropriate instructions. Such a procedure was imperative since the exact basis upon which the shipowner's negligence was found by the jury was uncertain. Whether the right to indemnity exists would most naturally be determined by the jury, which, in the first instance knew precisely upon which of several theories the shipowner's liability was grounded. As in *Weyerhaeuser* where at least three possible bases of liability were apparent and one at least would not preclude indemnity, the jury determination would thus decide whether the theory applied by it warranted a finding of a breach of contract and whether indemnity would follow.

The Court of Appeals Reversed the Findings of the Jury and the Judgment Entered Thereon Upon the Erroneous Conclusion That the Trial Judge Failed to Submit to the Jury the Question of Unsafe Place to Work in Determining Whether Petitioner Breached Its Contractual Obligation.

The Court of Appeals in the instant case disregards the mandate of *Porello* and *Weyerhaeuser*. It gives no consideration and makes no reference to the contract between the parties and ignores the fact that the jury's finding specifically exculpated petitioner of any breach of its contractual obligation, or of any negligence in "handling" cargo in an unsafe place after fully considering the con-

tract under a full and appropriate charge of the trial judge (R. 171a, 172a, 173a).'

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7. "I must so instruct you because I have to go to the second cause of action, which is the action by Ellerman Company against Atlantic & Gulf Stevedores. This action arises out of contract. Ellerman Lines *had a contract with the Atlantic & Gulf Stevedores, and that contract is before you, and you will read it and see just what the Atlantic & Gulf Stevedores contracted to do.*

Under one portion of that contract they were supposed to unload and discharge this cargo of burlap with the utmost care. *There are other portions of the contract that you may advert to; the whole contract is in evidence.* In this action by Ellerman Lines and The City Line against Atlantic & Gulf Stevedores whom the defendants brought in, the focal point of your inquiry is *whether there was any breach of that contract,* whether there was a substandard performance in which there was foreseeability that injury might occur to someone in the breach of that contract, and while there is a tort measurement of that standard it nevertheless is still a contract action, and the third-party defendant, Atlantic & Gulf Stevedores, are only responsible for the breach of that contract.

Ellerman Steamship Company says to you that if there is any liability which we owe to Mr. Beard that condition was created by Atlantic & Gulf Stevedores. That is your criterion: *Did the Atlantic & Gulf Stevedores create the condition which made Ellerman Lines and The City Lines responsible to the Plaintiff? There again you have to run the whole gamut of facts in the case.* You will have to decide whether or not there was an unreasonable discharge of this cargo, an unsafe method used in the discharge of this cargo, in the placing of the hook. *Did they breach that contract to do it in a workmanlike manner with the utmost care?* The steamship company says, "Yes, they did. They breached *that contract.* They did not do it in a workmanlike manner. All the evidence here points to the fact that they did not do it with the utmost care, and therefore they caused the condition which created the liability which is ours, which the plaintiff has secured against us as defendants."

In other words, did the liability of the Ellerman Lines, Limited, and *The City Line, Limited, arise out of any failure on the part of Atlantic & Gulf Stevedores to do its work in accordance with the contractual obligations?* If you answer that yes, then your next inquiry is: Was the breach of this contract by Atlantic & Gulf Stevedores a substantial factor in bringing about the injuries to the plaintiff?

. . . If you find that Atlantic & Gulf Stevedores did breach *their contract* with the defendant, and that they were the contributing cause of the liability which they incurred to the plaintiff then you should render a verdict in the amount, same amount, which you rendered against the defendant, and you should render that against the third-party defendant, Atlantic & Gulf Stevedores." (Emphasis added.)

It is evident from the quotation of the charge on this point, that although the shipowner had presented no evidence on any other point except the use of the bale hooks, the District Court told the jury that the *whole* contract should be adverted to, and left to them whether there was *ANY* breach of that contract. He left to them whether there was a substandard performance of *any part of the contract* and whether the liability of the shipowner arose "out of *ANY* failure on the part of" Petitioner.

Reference to the charge to the jury also reveals that the Court of Appeals erred in concluding that the "sole criterion" prescribed by the District Court was whether an unsafe method was used in the discharge of the cargo by the bale-hook method (R. 229). On the contrary, the "criterion" submitted by the District Court was whether the shipowner's liability "was created by Atlantic & Gulf Stevedores", and whether Atlantic & Gulf Stevedores created "the condition which made Ellerman Lines and the City Line responsible to the plaintiff" (R. 172a). In determining these issues the jury was instructed that "there again, you have to run the whole gamut of the facts in the case" (R. 172a).

Thus it is evident that the Trial Judge specifically followed the mandate of this Court in the *Porello* and *Weyerhaeuser* cases whereas the action of the Court of Appeals was in direct conflict with the rules of law enunciated in these cases.

Relating the special verdict of the jury to the contract here involved, it is obvious that the injuries were not caused by any failure or negligence of the Petitioner or any act constituting a breach of contract.

The Court of Appeals Erroneously Reversed the Findings of the Jury and the Judgment Entered Thereon in Total Disregard of the Evidence in Support of the Verdict Without Reference to the Terms of the Express Written Contract Between the Parties and Seizing Upon a Suggestion by Counsel for Petitioner, That the Jury Could Have Found Negligence of the Shipowner on the Basis of Improper Stowage and Assumed That the Jury in Fact So Found, Totally Disregarding That Other Independent Grounds of Negligence of Shipowner of Which the Jury Acquitted Petitioner, Were Equally Supported by the Evidence.

The ship's failure to examine the bands of the bales at the time of stowage in India; the improper stowage of the two consignments; the failure to discharge the New York consignment before the arrival of the vessel in Philadelphia and the "unseaworthiness of the vessel", created by these failures and conditions, were all facts and conditions in existence before the initial application of the contract to the particular job here involved. The jury's special verdict holding the shipowner negligent could, as in *Weyerhaeuser*, have been predicated as to negligence on any one of these factual grounds, all existing prior to and in the absence of any act or conduct of the Petitioner, and which would "prevent recovery" of indemnity in the third-party action. (*Weyerhaeuser*, 355 U. S. p. 568.) [8]

8. The Circuit Court seized upon a suggestion, of counsel for petitioner, in its brief, that the jury *could* have found negligence of the shipowner on the basis of improper stowage of the New York cargo and assumed that the jury had in fact so found, totally disregarding that its finding (Interrogatory 2) that shipowner was negligent could have been made upon other independent grounds of negligence equally well supported by the evidence. On this *speculative* suggestion, made only as part of the argument, as being within the realm of possibility, the Court below predicates its holding, treating it as an established fact. Forced to recognize that it was only *speculation* however the Court below evidences the utter weakness of the assumption when it says (289 F. 2d 201, 207): ". . . and

To hold that a stevedore may be liable as an indemnitor for the liability of a shipowner caused by the shipowner's negligence and conditions committed and existing at the time of the application of the contract and merely for working under such conditions or for the interaction of such conditions, equipment or stowage which the Petitioner did not control and had no contractual duty to supply, repair, correct or control, is to make of the stevedore an absolute guarantor and to create a contractual indemnity far beyond the compass of the agreement actually made and here involved: *Smith v. Pan Atlantic Steamship Corporation*, 161 F. Supp. 422 (E. D. Pa. 1957) aff'd per curiam, 254 F. 2d 600 (3rd Cir. 1958), which held that under such circumstances the stevedore was performing, not breaching, the contract.

Under the facts presented by the evidence, nothing short of a contract agreeing to hold the shipowner harmless or indemnifying the shipowner against its own independent negligence and expressly accepting liability to Petitioner's employees caused by the shipowner's acts in creating or causing an unseaworthy condition, in whole or in part, could be held to impose such absolute liability on the stevedore—No Such Contract Existed.

The effect of the decision of the Court of Appeals is to create such absolute liability on the part of the stevedore who enters into *any* indemnity agreement no matter how carefully the language of the agreement is written to limit such indemnity. Since a stevedore is generally deemed to be an "expert" the conclusions reached by the Court of Appeals in this case, if allowed to prevail as the applicable law, would require every Court to hold that the "expertise" of

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thus *if* it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic, to "handle" the cargo in the unsafe place to work." (Emphasis supplied.)

The fact is that the answer to Interrogatory No. 2 was justified for any one of several reasons supported by the evidence other than the one "suggested" by the Petitioner's counsel and such other grounds did not involve the Petitioner at all.

the stevedore is in itself a sufficient substitute for a specific and clear agreement to be liable as an indemnitor. This is directly contrary to the holding of *Porello* and *Weyerhaeuser*.

A contract for indemnity against the consequences of one's own negligence must be clear and definite in its provisions: *Chicago R. I. & P. R. Co. v. Williams*, 245 F. 2d 397. The language employed must clearly and definitely show an intention to indemnify against a certain loss or liability; otherwise it is not a contract of indemnity: 42 C. J. S. Indemnity Section 5; *Frankel v. Johns Manville Corp.*, 257 F. 2d 508; *Thompson-Starrett Co. v. Otis Elevator Co.*, 271 N. Y. 36, 2 N. E. 35, 36. In the latter two cases the indemnitees were found to be negligent, while the indemnitor, as in our case, was found not to be negligent. The Court, in each case, pointed out the necessity for unequivocal language, if one is to be indemnified against his own negligence and denied recovery to the indemnitee: Cf. *Salamy v. New York Central System*, 146 N. Y. S. 2d 814.

An agreement by a stevedore to indemnify a party for liability for personal injuries must express an intention to throw loss upon the indemnitor beyond peradventure of a doubt: *Pierce v. Erie R. Co.*, 165 F. Supp. 216, aff'd 264 F. 2d 136.

Where an express contract exists, the law will not imply a different agreement: *Martin v. City of Port Huron*, 111 F. 2d 759 (C. C. A. 6th 1940); *Haver v. Bond Stores*, 178 F. 2d 836 (C. C. A. 6th 1950); *Ferroline Corp. v. General Analine & Film Corp.*, 107 F. Supp. 326, affirmed 207 F. 2d 912, cert. denied 74 S. Ct. 678, 347 U. S. 953, rehearing denied 74 S. Ct. 748, 347 U. S. 979.

It is not believed that this Court intended in the *Ryan* case, or any case involving similar issues since that time, to undermine the Longshoremen's Act or to announce as an absolute principle of law that, without regard to whether a stevedoring company intends to agree to indemnify or

agrees to indemnity only in the event of certain contingencies involving its own negligence, it has nevertheless agreed to absolute liability for such indemnity merely because it agrees to do a job. We submit *Weyerhaeuser* makes it clear that this was not this Court's intention in *Ryan*. On the contrary *Weyerhaeuser* makes it clear that in the *presence* of a written contract, the terms of the writing must be considered and will control.

The Court of Appeals in the instant case held instead that the contractual obligation of the stevedore was to be equated with the duty of the shipowner to the Plaintiff. Hence, solely on the fact that the shipowner was found to be negligent it concluded that the stevedore had to be negligent, despite the jury's special verdict to the contrary.

The effect of the holding of the Court of Appeals is to thwart entirely the import of the limited liability of a stevedore which the Longshoremen's Act was deliberately designed to afford except where the stevedore specifically and voluntarily assumes burdens beyond the Act by contract. There is no evidence in this case to support the conclusion of the Court below that the petitioner voluntarily agreed to give up the limited liability which the Longshoremen's Act afforded. It agreed contractually and in writing merely to do its work "with every care and due dispatch to the satisfaction of" the shipowner (R. 148a) (Appellant's Appendix). (Since there was no damage to cargo the agreement to pay for damage to cargo if "caused through rough handling and/or theft or pilferage by the stevedore's men during the time of stevedoring operations" is not applicable here (R. 152a). *There are no other words or language* in the agreement relating to indemnity. The absence of such words in the presence of a written contract setting forth in detail the rights, duties, and obligations of the parties must be held to mean that no voluntary burden of indemnity was assumed or accepted. Since the shipowner wrote the contract and found no difficulties in clearly imposing an obligation of indemnity in the case of damage to cargo it must be

assumed that if he had wanted indemnity as to other losses or injuries he could have so stated in clear, unambiguous and unmistakable terms.

The decision of the Court of Appeals is contrary to law generally and in direct conflict with *Porello* and *Weyerhaeuser*.

III.

A Consideration of Cases Involving the Liability of a Putative Indemnitor Since the Enactment of the Longshoremen's Act.

Whereas in the instant case, the putative indemnitor's liability to the injured party is abolished by statute, the situation no longer calls for the application of the doctrine of indemnity on the same principles which govern the ordinary case of tortfeasors; that a difference in the nature of degree of fault as between them may entitle one to shift the entire burden of loss to the other as in *Standard Oil Co. v. Robins Dry Dock & Repair Co.*, 32 F. 2d 182 (2nd Cir., 1929). Cases like the *Robins* case (*supra*) involved situations where both indemnitor and indemnitee are liable to the injured party.

When the putative indemnitor's liability to the injured party is abolished, as it was by the Longshoremen's Act, the case takes on a different aspect. If the Longshoremen's Act is held to constitute a bar to contribution claims (*Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282) then indemnity in this sense must be in the same category, since it is, after all, for this purpose merely an "extreme form of contribution". (*Slattery v. Marra Bros., Inc.*, 186 F. 2d 134, 138). On the other hand, if the stevedore has breached an independent duty owed to the shipowner, as for example *a contractual duty* the case may be viewed on a different footing. Inasmuch as the employer no longer owes any enforceable duty of due care to the employee, any discussion of "fault" or "negligence"

of the employer can be relevant only to the extent it bears upon the *proper construction of his independent duty to the shipowner* which in this class of cases derives from the contractual relationship. In the courts which have considered this question, this approach has won acceptance in the best considered cases.

Thus, in *United States v. Harrison*, 245 F. 2d 911 (9th Cir. 1957) the Court held that even where an express indemnification contract exists, recovery over against the stevedore may be denied where it was expressly found that the stevedoring company was not at fault or negligent in any manner and that the injuries sustained by the longshoreman while unloading cargo from an oily deck of a government vessel was the sole fault of government agents. It was held, relying on *Sieracki* (328 U. S. 85, 100), that the contract of indemnity did not shift to the stevedore the burden of keeping the vessel seaworthy at all times and that the stevedore was not bound by the contract not to unload the vessel until the slippery deck had been remedied by the stevedore himself.

In the case now before this Court, as in *Harrison*, the jury expressly found that Petitioner was not at fault and that the shipowners' fault did not arise out of any breach of contract by stevedore. Neither *Harrison* nor the instant case involves facts where the unseaworthiness was caused by the stevedore himself and the ship is held to absolute liability as a result (Cf. *Ryan*, 350 U. S. 124).

In *American Steamship v. Copp*, 245 F. 2d 291 (9th Cir. 1957) the Court denied indemnity on the basis that both the vessel and the stevedore were joint tort feasors, concurrently, continuously and actively negligent, and that such negligence on the part of both was the proximate cause of the Plaintiff's injury. The Court recognising that this Court had treated of the subject said:

> "With such a fact situation, therefore, this case is governed by the decisions of the Supreme Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting*

Corp. . . . That opinion may weaken to some extent the authority of the decisions of the appellate courts of the federal system relating to indemnification of the ship by the stevedore. But no opinion need be expressed as to that point here."

Thus, even if in the instant case the jury had found the stevedore guilty of negligence no right to indemnity would follow in view of the finding that the negligence of the shipowner was the substantial factor in causing Plaintiff's injuries.

In *Reddick v. McAllister Lines Ltd.*, 258 F. 2d (2nd Cir. 1958, certiorari denied 358 U. S. 908) a longshoreman was injured when he fell from a defective wooden crate on a ship during unloading operations. The trial court held the ship unseaworthy, found the longshoreman had not been furnished with a safe place to work because of the defective crate, but allowed indemnity on the basis that the stevedore was negligent in stowing the crates too closely. The Court of Appeals reversed and denied indemnity on the theory that the injury was caused by the defective crate and that the stevedoring company's breach of warranty in loading the cargo improperly, was not a cause of the injury. Although considering the cases of *Ryan* and *Weyerhaeuser* the Appellate Court held that under the general test of foreseeability applied to contractual liability the breach must be the cause of the injury, to impose liability.

In the *Hagens* case (*supra*) the Third Circuit Court, referring to *Weyerhaeuser*, held the shipowner was not entitled to indemnity from the stevedore where the injury to the longshoreman resulted from a defective and unseaworthy winch which contractually was to be furnished by the shipowner and where the stevedore's negligence consisted only of failing to discover and correct the shipowner's breach. By analogy to the *Ryan* case, the Court declared that "the promisor cannot use the promisee's failure to discover and correct the provisor's own breach as a defense."

The *Hagans* decision was followed in *Smith v. Pan Atlantic Steamship Corporation*, 161 F. Supp. 422 (E. D. Pa. 1957), affirmed per curiam (254 F. 2d 600) several months after the decision in *Weyerhaeuser*, and also in *Hodgson v. Lloyd Brasileiro Patrimonio Nacional* (*supra*). In the *Smith* case, Judge Kirkpatrick granted judgment n.ov. in favor of the stevedore on the authority of *Hagans*, reasoning that the stevedore's negligence did not supersede the ship's violation of its duty to furnish seaworthy equipment. In the course of his opinion Judge Kirkpatrick made these vital observations (161 F. Supp. 422, 423):

> "In the present case, the alleged default of the stevedore was not in breaching its contract but in carrying it out under conditions created by the shipowner. In substance, the shipowner argues that the stevedore should have stopped the work until the winch was fixed but, *bearing in mind that the basis of indemnity is contractual*, how can it be argued that the stevedore breached its contract with the ship by not refusing to go on with the equipment furnished by the ship? *Is it part of a stevedoring contract that the stevedore will walk off the job if he finds the ship's equipment unsuitable? It may be negligent for him not to do so but it is in furtherance of his contract rather than a breach of it, and the shipowner could hardly hold him liable for trying to complete the work.*" (Emphasis supplied.)

So, in *Hodgson* (*supra*), where the stevedore was actually required to "provide all necessary stevedoring labor, including winchmen . . . and such other stevedore-supervision as are needed for the proper and efficient conduct of the work" the Court held (294 F. 2d 32, 24) that under their agreement the stevedoring company was not required to act as an insurer against any loss the shipowner might suffer, or to maintain the winches. Referring to the cases of *Ryan and Weyerhaeuser* and the obligation of the stevedore to perform its services in a workmanlike manner, the

Court held that whether the stevedore's conduct constituted a breach of the contractual provision was, of course, a question of fact for the jury.

The cases decided by this Court have made it clear that the liability arising from a shipowner's duty to provide a seaworthy vessel is absolute (*Seas Shipping Co. v. Sieracki*, 328 U. S. 85) and is essentially a species of liability without fault and that the liability is neither limited by conceptions of negligence nor contractual in character (*Mitchell v. Trawler Racer*, 362 U. S. 539). The shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability (*Alaska S. S. Co. v. Petterson*, 347 U. S. 396).

On the other hand, it is equally clear from the decisions of this Court and other Courts heretofore analyzed in this Brief that the liability of a stevedore for indemnity since the enactment of the Longshoremen's Act is contractual in character (*Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp.* (*supra*)). The critical questions in actions for indemnity therefore are (a) whether a contractual obligation exists, (b) whether there has been a breach of such contractual obligation, that is, whether the stevedore rendered a substandard performance which led to foreseeable liability of the shipowner (*Weyerhaeuser, supra*) and finally, (c) whether there is conduct on the part of the shipowner sufficient to preclude recovery. Each of these questions require resolution of facts, which a jury is not only most competent to do, but is indeed alone justified, under our law, to do.

No fixed pattern can be set as to what conduct on the part of a shipowner will be sufficient to preclude recovery. The cases discussed in this subdivision however represent decisions which involve facts most frequently found. Their holdings may be summarized, as general rules, by no means exclusive, applicable to such situations as follows:

Where it is expressly found that the stevedore was not at fault, and that shipowner was alone responsible for

unseaworthiness and negligence, no indemnity can be recovered.

Where both parties are equally guilty of wrongful conduct one of such guilty parties has no right of indemnity or contribution from the other, if he has been held responsible in damages to the injured party.

Where the shipowner is found guilty of negligence which is the cause of the injury and stevedore's breach *is not* the cause of the injury under the general test of foreseeability applied to contractual liability, there is no right to indemnity.

Where it is found the shipowner provided defective equipment, failure of the stevedore to discover the defect, or continuing to work in the presence of the defective equipment will not subject stevedore to an obligation to indemnify.

In the absence of a contractual obligation to inspect or maintain equipment supplied by, or to correct conditions created by the shipowner, a stevedore is not an insurer against any loss that the shipowner might suffer and is not liable as an indemnitor, unless he expressly assumes the obligation of an insurer.

Conclusion.

The questions here presented are of paramount importance in the decision of longshoreman cases brought against shipowners and involving third-party actions for indemnity against stevedores, particularly when the contract between stevedores and shipowners is in writing. Settlement of the question by this Court is plainly in the public interest since it is likely to be presented in almost every such case hereafter brought, including many cases now pending.

This decision places in grave doubt whether the express written undertakings and limitation of responsibilities be-

tween shipowner and stevedore have any meaning. It is of industry-wide concern that such a written contract can be nullified by imposing the duty on a stevedore to indemnify a shipowner for the breach of an implied warranty, by striking down a jury finding that the express provisions of a contract were not breached.

Congress passed the Longshoremen's and Harborworkers' Act to establish liability without fault, albeit in a lesser sum. It thereby relieved employers of large tort verdicts. In so doing, absolute liability was imposed upon the employer to provide a fair measure of compensation to its injured employee. After the Longshoremen's Act the claim by a shipowner for "contribution" was denied *where joint negligence existed. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952).

Since the passage of the Act, shipowners have sought to have stevedores agree by contract to accept a consensual obligation to indemnify shipowners for liability shipowners may have to longshoremen. Such contracts are valid despite the Longshoremen's Act and are enforceable. On the other hand, they should not be construed to enlarge the liability of a stevedore beyond the obligations which he does in fact consensually undertake. They should be construed cautiously and indemnity allowed only when it is expressly and clearly assumed. The case before this Court holds the Petitioner liable for indemnity without limitation and without reference to the terms of the written contract. If the decision of the Court of Appeals is permitted to stand the stevedore is deprived of the protection intended by the Act.

The result is to make a stevedore wholly liable for all injuries to its own employees in the absence of any showing that its work could have been performed more safely. Thus the financial burden intended to be removed from the shoulders of the stevedore by the Longshoremen's Act has been replaced, although not voluntarily assumed or clearly justified by law or contract. Such harsh consequences can lead to the survival of but a few of the stevedoring firms who

possess an infallible degree of "expertise" or a willingness, backed by sufficient wealth, to become an insurer. The end result must adversely affect the entire shipping industry.

This decision is a sharp erosion of the Constitutional mandate that "No fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law." Unless this decision is reversed further erosion of the mandate will surely follow.

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be reversed and the judgment of the District Court be reinstated.

Respectfully submitted,

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